



Neutral Citation Number: [2023] EWHC 933 (Ch)

Case No: PT-2022-000440

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (CH)

Royal Courts of Justice
Rolls Building, London EC4A 1NL

Date: 28/04/2023

Before :

DEPUTY MASTER BOWLES

Between :

(1) Aidan Gregory McDonagh
(2) Tamara Susan Juliet McDonagh
- and -
Karen Reeve

Claimants

Defendant

Tom Weekes KC (instructed by **McDonaghs Solicitors Ltd**) for the **Claimants**
Charles Auld (instructed by **Nalders LLP**) for the **Defendant**

Hearing date: 13 February 2023

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DEPUTY MASTER BOWLES

Deputy Master Bowles :

1. The Claimants, Mr and Mrs McDonagh, are the freehold owners of a property at and known as Rose Cottage, 1 Brudenell Road, Poole BH13 7NN (Rose Cottage). The Defendant, Karen Reeve (Ms Reeve), is the freehold owner of the adjoining property at 4a Brudenell Avenue, Poole BH13 7NW (4a).
2. As owner of 4a, Ms Reeve has the benefit of a restrictive covenant contained in a transfer dated 24th January 1958 (the 1958 covenant), whereby the transferor, a Mr Saul, covenanted, for himself and his successors in title, with the transferee, a Mr Donaldson, such as to benefit the land then transferred, then known as ‘Barnwood’ and which includes 4a, and such as to bind the land then retained by Mr Saul, then known as ‘the Lodge’, which land includes Rose Cottage, that ‘no additional buildings whatsoever’ should ‘at any time be erected on’ the Lodge.
3. In this litigation, commenced by a Part 8 Claim, dated 22 May 2022, Mr and Mrs McDonagh seek a declaration that, on the true construction of the 1958 covenant, by which Rose Cottage is bound, their proposed development of that land, by the demolition of the current building on that land and its replacement by a substantially larger building, for which they have received a planning consent, dated 26 October 2021, will not amount to, or constitute, a breach of that covenant.
4. Prior to the 1958 transfer, Barnwood and the Lodge were in the single ownership of Mr Saul and consisted of a large house (Barnwood) and a smaller house in its grounds (the Lodge). By the transfer, Mr Saul sold the large house and a portion of its grounds to Mr Donaldson, retaining the Lodge and the balance of what had been the original grounds. The Lodge was renamed Rose Cottage. As appears from the plan annexed to the planning permission granted in 1957, to enable the severance of the Lodge from Barnwood, the smaller house, now renamed Rose Cottage, formed only a relatively small part of the land retained by Mr Saul and, at that stage, subjected to the covenant given to Mr Donaldson by Mr Saul. There was no other building on the retained land.
5. The position on the land remained as last set out until 1988. In that year the then owners of Rose Cottage conveyed the bulk of the land held with Rose Cottage to the then owners of Barnwood, with the consequence that the 1958 covenant ceased to apply to that land. The extent of the land so conveyed is shown coloured pink and blue on the plan annexed to a trust deed dated 6 June 1988 entered into between both sets of freeholders and dealing, primarily, with the apportionment of any development value in the land conveyed, as between the two sets of freeholders. The 1958 covenant remained binding and effective in respect of the land retained by the then owners of Rose Cottage, namely Rose Cottage itself and the land immediately surrounding Rose Cottage.
6. As part, however, of the overall arrangements made between the two sets of freeholders, the owners of Barnwood, a Mr and Mrs Griggs, by a further deed, dated 6 June 1988 (the 1988 deed), granted to the then owners of Rose Cottage, a Mr Thompson and a Ms Henty, ‘the right to erect a rear extension at the side of (Rose Cottage) to form a garage and at first floor to form a dining room and kitchen and to convert the existing garage at the said property to a bedroom ... together with a pitched roof on the said extension’. The clause of the 1988 deed, containing this grant, went on to provide that the 1958 covenant, ‘relating to the erection of additional buildings’, should ‘be deemed to be

modified pursuant to the terms of this clause, but that '(s)ave as modified' it was 'agreed and declared that the (1958 covenant)' should 'remain in full force and effect'

7. While it is common ground between the parties, that the apparent construction placed upon the 1958 covenant, by the parties to the 1988 deed, namely that, unless and to the extent modified by the 1988 deed, it prohibited any extension, or addition, to the original Rose Cottage building, cannot, in itself, afford any guidance to the proper construction of the 1958 covenant, it is contended, on behalf of Ms Reeve and as explained later in this judgment, that the construction of the covenant, as understood and as acted upon by the parties to the 1988 deed, estops the parties, as privies and successors to the parties to the 1988 deed and, in particular, estops Mr and Mrs McDonagh, from asserting a construction of the 1958 covenant which is inconsistent with the construction of that covenant adopted and applied by the parties in 1988.
8. To complete the conveyancing history, in 1990 the pink land, as shown in the 1988 trust deed was sold off to developers, who constructed a house on that land (now 1a Brudenell Avenue). The transfer to the developers, Duncan Estates Ltd, contained restrictive covenants which restricted the height of certain of the fencing of the property to 5 foot, prohibited the erection of any building the height of any part of which extended above 14 metres, restricted any building upon a part of the transferred land edged yellow on the transfer plan and further restricted the growth of any timber or trees on the transferred land which unduly interfered with the sea views from Barnwood. Those covenants, specifically that relating to the interference with the sea views from Barnwood, replicated earlier covenants, for the protection of sea views, contained in earlier conveyances in 1924 and 1926, entered into, as I understand it when the land, of which the land upon which Barnwood and the Lodge were erected formed a part, was first sold for housing and first developed.
9. In 2009/2010, the then freeholder of Barnwood demolished Barnwood and built two new houses on what had been the Barnwood land (4 and 4a Brudenell Avenue). Both those properties have the benefit of the 1958 covenant. The Defendant, Ms Reeve, is the owner of 4a.
10. The essence of the submissions made on behalf of Mr and Mrs McDonagh is that the covenant does not restrict the erection of a building in replacement of the existing Rose Cottage, but extends only to the erection, on the land subject to the covenant, of buildings additional to Rose Cottage. It is submitted, given that, in principle, the covenant operates in perpetuity, that a construction which didn't permit the replacement of the original Rose Cottage, by a replacement, or substitute, in circumstances where, for example, the building had been destroyed by fire, or reached the end of its working, or natural, life, would be absurd and could not, therefore, have been intended by the parties, when the 1958 covenant was entered into. It is further submitted that, because the covenant is only intended to preclude the erection of buildings additional to Rose Cottage,, it does not impose any limitations as to the extent, size, or footprint of any building erected in replacement of the existing Rose Cottage..
11. Mr Auld, for Ms Reeve, submits, by way of primary submission, that any building erected on the subjected land, whether in addition to, or replacement of, the original Rose Cottage, constitutes an additional building, for purposes of the covenant, since such a new building would, he submits, plainly be additional to the building which was on the land in 1958. His answer, to what I will call the 'absurdity' point, is that the 1958

covenant must be read in the context of section 84 of the Law of Property Act 1925, as then in force, and that, in circumstances where the original building, for one reason, or another, required replacement, it would have been open to the owners of Rose Cottage to apply, pursuant to section 84(1)(c) of that Act, for a modification of the covenant to enable the replacement of the building in such manner as not to adversely affect the persons then entitled to the benefit of the 1958 covenant.

12. Mr Auld's secondary submission, were the court to conclude that a proper reading of the 1958 covenant did not preclude the erection of a new building, in replacement, of the existing Rose Cottage, is that, to comply with the covenant and so that the new building did not constitute, or amount to, an additional building, any new building would have to equate to the original building in size and area. On that footing, the new building, proposed by Mr and McDonagh and which has a prospective area greatly in excess of the existing Rose Cottage, would, at least to the extent that it exceeded the size and footprint of the existing building, constitute a breach of the covenant.
13. In relation to his secondary submission, Mr Auld contends, as outlined above, that, as a result of the dealings, in 1988, between the then freeholders of Rose Cottage and Barnwood, in respect of the works then carried out to Rose Cottage, and, in particular, as a result of what he submits was the shared assumption, as to the reach of the 1958 covenant, upon which the parties acted, in negotiating and entering into the 1988 deed, the then owners of Rose Cottage were estopped from resiling from the construction of the covenant upon which the parties then acted, such that Mr and Mrs McDonagh, as successors in title to the then owners of Rose Cottage are, likewise, estopped from resiling from that construction, or asserting a construction inconsistent with that construction.
14. As set out in paragraph 7 of this judgment, the parties, in 1988, evidently acted upon the footing that, subject to the one-off modification granted by the 1988 deed, the 1958 covenant precluded any addition to, or extension of, the original Rose Cottage building. Accordingly, it is Mr Auld's submission that, even if, standing alone, his secondary submission is incorrect and does not put any limit upon the size of a building, in replacement of the original Rose Cottage, then, nonetheless, Mr and Mrs McDonagh are estopped from asserting a construction of the 1958 covenant which, whether in respect of the original Rose Cottage, or any replacement, enabled, or entitled, Mr and Mrs McDonagh to build beyond, or outside, the original parameters of Rose Cottage.
15. I am not persuaded that an estoppel (in this case, by way of convention) operates in the circumstances with which I am concerned. There is no suggestion that Ms Reeve, in her dealings in respect of 4a, has, in any way, acted in reliance upon the understanding of the 1958 covenant apparently adopted by the parties in 1988. Accordingly, any estoppel must arise, solely, out of the parties election to enter into the 1988 Deed, on the footing of their, then, shared understanding of the reach of the 1958 covenant and must have been completed, or crystallised, by their entering into the 1988 Deed, in reliance upon that shared understanding, such as to bind the then owners of Rose Cottage and Mr and Mrs McDonagh, as their successors in title.
16. For the 1988 transaction and for any conventional understanding, as between the parties to the 1988 transaction, in respect of the reach of the 1958 covenant, to give rise to an estoppel, the party entitled to the estoppel (in this case Mr and Mrs Griggs) must have acted in reliance upon the relevant understanding, or assumption, to their detriment, or

establish some other circumstance, arising out of their reliance upon the joint assumption, or understanding, such as to render it unconscionable, or inequitable, for the then owners of Rose Cottage, to resile from the assumption as to the reach of the 1958 covenant upon which both parties acted.

17. I can see no basis upon which it could be said that, in entering into the 1988 Deed, on the basis of, from their perspective, a favourable understanding as to the reach of the 1958 covenant, Mr and Mrs Griggs acted in any way to their detriment, or, correspondingly, that their reliance upon the joint assumption as to the reach of the 1958 covenant, when entering into the 1988 Deed, gave rise to any circumstance rendering it unconscionable, or inequitable, thereafter, for the then owners of Rose Cottage, or, now, their successors, to resile from the understanding upon which they had acted. Mr Auld, likewise, was not, I think, able to point either to any material detriment arising from the 1988 Deed, or any other circumstance such as to render it inequitable for the owners of Rose Cottage, in 1988, to, subsequently, resile from the parties previous understanding of the reach of the 1958 covenant.
18. In the result, I am satisfied that no estoppel arises, in this case, and that, consequently, the decision for this court is, purely, one of construction.
19. The core approach to the question of construction is not in any dispute. The task of the court is to determine the intention of the parties, as to the meaning and effect of the covenant in question, by a process of textual and contextual analysis. In reaching its conclusion, the court should have regard to the natural meaning of the covenant, to all relevant surrounding circumstances, as known, or understood, by the parties to the covenant, at the time when the covenant was entered into, and to the so-called 'commercial common sense' of the construction said to be placed upon the covenant. The court should, of course, disregard evidence as to the subjective intention of the parties, when entering into the covenant, since its task is to determine the intent of the parties, as objectively understood.
20. In regard to 'commercial common sense', the court should be careful not too readily to move away from the natural meaning of the provision in question, in favour of a construction said to be more consistent with commercial common sense. In particular, the fact, that a particular provision, as drawn, may, in the event, have worked out badly for one party or the other, or may, as in this case, be said to give rise to 'absurd' consequences is not, in itself, a good reason to abandon the natural meaning of the words used, in favour of one that avoids such consequences, if, on a proper analysis, the court is satisfied that, notwithstanding those consequences, that is what the parties, at the date of the covenant, or contract, in question chose to agree. Parties make imprudent and ill-advised arrangements and, when they do, it is no part of the function of the court to re-write the parties' agreement, or to impose the meaning that the parties should have agreed rather than the one that they did agree.
21. There are, in this case, a number of surrounding circumstances relevant, or potentially relevant, to the construction of the 1958 covenant.
22. Firstly and as emphasised by Mr Auld, it is apparent that the preservation of the sea views, from Barnwood and from the land of which Barnwood originally formed a part, has, over time, been a matter of importance for those interested in Barnwood and in the land of which Barnwood initially formed part. That consideration emerges clearly from

the 1924 and 1926 conveyances and from the covenants taken, in 1990, when land formerly held with Rose Cottage was sold off for the construction of 1a Brudenell Avenue and I have very little doubt but that it was, likewise, a material consideration, for the owners of Barnwood, when the 1958 covenant was entered into.

23. In that context, I do not think that, as submitted by Mr Weekes KC, the 1958 was solely what he termed a density covenant, intended to provide only that there should be a single building on the land. Rather, I am satisfied that a part, at least, of the purpose of the 1958 covenant was to protect the sea views available, in 1958, from Barnwood.
24. Secondly, at the date of the 1958 covenant and as set out in paragraph 4 of this judgment and as shown in the plan referred to in that paragraph, the then existing building on the land retained, as Rose Cottage, by Mr Saul formed only a relatively small part of the land subjected to the covenant, which land was otherwise clear of any other buildings.
25. Thirdly, the 1958 covenant did not form a part of a building scheme. It was not, therefore, a covenant imposed by a developer, on those purchasing properties on a lotted estate, with a view to enhancing, or protecting, the quality and value of the plots put out for sale, as part of the development of such an estate. The 1958 covenant was a particular covenant entered into by Mr Saul, when the Lodge/Rose Cottage was severed from Barnwood, and was entered into, by Mr Saul, in respect of his own retained land.
26. Fourthly and, potentially, relevantly, as conceded by Mr Weekes KC, in the course of argument, is the fact, relied upon by Mr Auld, that, at the date of the 1958 covenant, there was, as touched upon in paragraph 11 of this judgment, some scope for releasing Mr Saul, or the subsequent owners of Rose Cottage, from the full rigours of the covenant, as construed by Mr Auld, by way of application, as at that date, to the Lands Tribunal, pursuant to section 84 of the Law of Property Act 1925.
27. In the context of the foregoing, I am satisfied that the 1958 covenant did not have the reach contended for by Mr Auld, whether by way of his primary, or his secondary, submission.
28. It seems to me that the natural and obvious meaning of the covenant, read in context, is that the covenantor, Mr Saul, by covenanting that ‘no additional buildings whatsoever’ should ‘at any time be erected on’ his retained land, promised no more than that no buildings in addition to, in the sense of ‘as well as’ the already existing building on the retained land (the Lodge/Rose Cottage) should be erected on that land. I do not think that the covenant touched upon the Lodge/Rose Cottage, itself, or was intended to preclude either the replacement of the Lodge/Rose Cottage, by way of a substitute building, or to preclude Mr Saul, or his successors, from altering, or extending the Lodge/Rose Cottage, or, if the original building were to be replaced, from setting limits upon the extent of any substituted building. The covenant was not a covenant about the Lodge/Rose Cottage. It was about the building of additional buildings, other than the Lodge/Rose Cottage, and the preclusion of such building on Mr Saul’s retained land.
29. That meaning, or construction, of the covenant seems to me to accord completely with the circumstances existing at the time when the covenant was entered into. At that date, the bulk of the retained land was open and unbuilt and afforded Barnwood, therefore, the sea views which, as I accept, would have been important to the then purchaser of Barnwood. Accordingly, a covenant which stopped any new, or additional, building on

the retained land, and protected, therefore, both the existing views from Barnwood and also precluded any overbuilding on Mr Saul's retained land, would have provided the purchaser of Barnwood with both the protections which, as it seems to me, a purchaser, in such circumstances, would have been likely to have required.

30. In the context and circumstances, as they then existed, it seems highly unlikely to me that the parties would have given any thought at all to the Lodge/Rose Cottage, whether as to its extension, or alteration, or its replacement, or substitution, or that it was the intention of either party that a covenant, dealing with additional buildings, should operate in respect of an existing building. The focus, I am satisfied, was, or would have been, upon the protection of Barnwood from any new building on the unbuilt bulk of the retained land. What, of course, has destroyed that protection is not the conduct, or intended conduct, of Mr and Mrs McDonagh, in respect of the current Rose Cottage building, but the release of the covenant, in respect of the bulk of the retained land consequential upon the purchase of the bulk of the retained land by the then owners of Barnwood in 1988, as explained in paragraph 5 of this judgment.
31. That limited construction of the covenant derives, in my view, support from two separate, but related, matters.
32. Firstly and obviously, if the parties had intended the covenant to preclude the replacement of the Lodge/Rose Cottage by a substitute building, or to place limits upon the size and footprint of any replacement building, or to preclude any alteration, or extension, of the Lodge/Rose Cottage, as opposed to merely excluding the erection of buildings, on the retained land, additional to the then existing building, one would have expected the covenant to say so. Such a covenant would constitute such a major interference with Mr Saul's rights in respect of his own land that, if intended by the parties, the clear expectation must be that explicit and specific words, to that effect, would have been used.
33. Secondly, there is, as it seems to me, the inherent unlikelihood that Mr Saul would have agreed to any such provision, or to any provision intended to have that effect. As set out earlier in this judgment, the 1958 covenant is not what I will call the usual developer's covenant, imposed by the developer upon the purchasers of building plots to protect the value and quality of the development. This was a covenant entered into by the owner of the retained land in respect of his own use of that land.
34. In that context, it is highly unlikely that he would have intended to fetter the use of his own land to the extent contended for by Mr Auld and, in particular, would have intended to preclude himself, or his successors, from extending, altering, or, if need be, replacing the existing building on the land, or, in the event of replacement, limiting the extent of that replacement, relying, only, upon an agreed release of rights by those entitled to the benefit of the covenant, or, as suggested by Mr Auld, upon the possibility that he might be entitled to secure a modification of the covenant, by application to the Lands Tribunal. It is very much more likely and, in my view the wording of the covenant bears this out, that he intended only to agree not to erect any buildings, in addition to the Lodge/Rose Cottage, on his retained land, thereby providing the owners of Barnwood the protections which, as set out earlier in this judgment, they would have required.

35. In the result, I am satisfied that the 1958 covenant does not prevent Mr and Mrs McDonagh from implementing the planning permission referred to in paragraph 3 of this judgment and replacing the existing Rose Cottage building with the one for which planning permission has been obtained. In reaching that conclusion I have, necessarily, had regard to the words of caution set out in paragraph 20 of this judgment. I am satisfied, however, that my conclusion does no more than reflect the proper construction of the 1958 covenant, having regard to its language and context.